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The Right to Change Defense or Claim by Amendments to the Pleadings

John C. McElhaney
University of Nebraska College of Law

The Right to Change Defense or Claim by Amendments to the Pleadings

Amendments to pleadings present many problems, such as when they may be made, the proper procedure to make them, and the subject matter permissible to be included in the proposed amendments. Only the problems concerning changes in defense or claim by amendments will be discussed herein.

I. AMENDMENTS GENERALLY

In general, the courts state that the statutes which govern amendments to the pleadings are to be construed liberally,[1] and a substantial amount of freedom is allowed in making amendments pertaining to parties, correcting the pleadings to conform to facts which have been proven, and in other matters for the furtherance of justice.[2] The Nebraska statutes applicable to these situations are found in § § 25-846 et seq. of the Nebraska Revised Statutes (Reissue 1956). The application of these statutes during the original trial is beyond the scope of this article, which will deal with less common phases of their application; the problem of amendments after appeal, reversal, and remand for further proceedings by the trial court, and a change from the defense expressed before trial to another when the parties reach trial. The amendments after appeal involve many possible situations, and attempted amendments at this stage of litigation have produced a variety of results. Some of these situations and the manner in which courts have dealt with them will be presented below.

II. CHANGE IN DEFENSE PLEADED FROM THAT USED IN PRE-TRIAL NEGOTIATIONS

Perhaps the first important point to consider, related to that of amendments after appeal, is that of changing by amendment the defense used during the pre-trial negotiations to another defense for trial. Generally, this is not permitted if it will cause

[1] Westrope v. Anderson, 98 Neb. 57, 151 N.W. 955 (1915) is an example. See also Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N.W.2d 889 (1948).

[2] See generally the introductory remarks in Clark, Code Pleading 703 (2d Ed. 1947).

detriment to the adverse party,[3] even though it is generally held that statutes pertaining to amendments should be construed liberally.[4] This allegation of a prohibited change of position was made in the recent case of *O'Neil v. Union National Life Ins. Co.*,[5] but the amendment was permitted as the court found that it did not change the pre-trial position. However, in the same case, the court indicated that had the amendment substantially changed the position from that taken prior to trial, the amendment would not have been allowed, stating that this was a well-established rule.[6] This rule is generally stated as an estoppel rule, indicating that if the prior position is one upon which the other party relies, and which, if changed, would have an adverse effect upon the other party, the person seeking the change is estopped from such. This same rule is followed in the federal courts.[7] Some of the cases, however, involve inconsistent defenses, and could have prevented the use of both positions by barring inconsistent defenses, as well as by the estoppel doctrine.[8] The procedure is sometimes ration-

[3] Railway Co. v. McCarthy, 96 U.S. 258 (1877); Brown v. Security Mutual Life Ins. Co., 150 Neb. 811, 36 N.W.2d 251 (1949); Serven v. Metropolitan Life Ins. Co., 132 Neb. 637, 272 N.W. 922 (1937); McDowell v. Metropolitan Life Ins. Co., 129 Neb. 764, 263 N.W. 145 (1935); Yates v. New England Mutual Life Ins. Co., 117 Neb. 265, 220 N.W. 285 (1928); Mitchell v. Brotherhood of Locomotive Firemen and Enginemen, 103 Neb. 791, 174 N.W. 422 (1919); Peterson v. Lincoln County, 92 Neb. 167, 138 N.W. 122 (1912); Frenzer v. Dufrene, 58 Neb. 432, 78 N.W. 719 (1899); Scott v. Spencer, 44 Neb. 93, 62 N.W. 312 (1895); Ballou v. Sherwood, 32 Neb. 666, 49 N.W. 790 (1891), *rehearing denied,* 50 N.W. 1131 (1892).

[4] See note 1 supra.

[5] 162 Neb. 284, 75 N.W.2d 739 (1956). The court stated that the proposed amendment merely made more specific the defense alleged throughout the proceedings, that of limited liability due to death during military action. The amendment merely set out these facts more clearly.

[6] 162 Neb. 284, 291, 75 N.W.2d 739, 744 (1956). The allegation was made that the proposed amendment changed the pre-trial position and also the position taken during the original trial.

[7] Railway Co. v. McCarthy, 96 U.S. 258 (1877), with cases cited therein.

[8] Yates v. New England Mutual Life Ins. Co., 117 Neb. 265, 220 N.W. 285 (1928) (change from defense of policy lapsed due to lack of premium payments to defense including suicide or otherwise by his own hand, making the insurer not liable); Mitchell v. Brotherhood of Locomotive Firemen and Enginemen, 103 Neb. 791, 174 N.W. 422 (1919) (change from defense of policy in force, only need proof of death, to defense of policy void due to false statements in application). Cf. Turner v. Grimes, 75 Neb. 412, 106 N.W. 465 (1906) (election of remedies by plaintiff). For discussion of pleading inconsistent defenses see Dow, The Right to Plead Inconsistent Defenses, 28 Neb. L. Rev. 29 (1948).

alized as merely a method of achieving manifest justice.[9] Following this rule, it would appear that to be consistent, after appeal and remand, a person would not be permitted to amend in order to change the position or legal theory which was used in the original trial. However, this is not the rule as enunciated in numerous cases.

III. AMENDMENTS AFTER APPEAL—GENERAL

The statement that amendments are to be liberally allowed in furtherance of justice is applied more fully to amendments after remand than to changes from the pre-trial defense. A general rule is that amendments may be made under remand to modify almost any matter in the case as long as it is not inconsistent with the opinion of the appellate court,[10] and does not seek to have relitigated something upon which the appellate court has given a ruling. This general rule is reiterated throughout the cases in Nebraska,[11] the federal courts,[12] and other state courts, in varying forms as required by the particular fact situation involved.[13]

An estoppel doctrine exists after remand as well as during the original trial. This is a true estoppel in fact, as some facts which might have been pleaded in the original trial are now barred by estoppel.[14] Others, which were not known or were not available during the original trial, may be brought in by amendment at the retrial.[15] Unless there is an estoppel in fact, there is

[9] Yates v. New England Mutual Life Ins. Co., 117 Neb. 265, 271, 220 N.W. 285, 287-88 (1928).

[10] See Rogers v. Hill, 289 U.S. 582 (1933).

[11] State ex rel. Davis v. American State Bank, 115 Neb. 81, 211 N.W. 201 (1926); Miller v. Ruzicka, 111 Neb. 815, 198 N.W. 148 (1924); Pinkham v. Pinkham, 60 Neb. 600, 83 N.W. 837 (1900).

[12] For a general discussion of these problems in the federal courts, see 3 Moore, Federal Practice ¶ 15.11 (2d ed. 1948).

[13] See notes 20, 21, and 31, infra.

[14] Bryne v. United States, 218 F.2d 327 (1st Cir. 1955); Troup v. Horbach, 57 Neb. 644, 78 N.W. 286 (1899). Contra, Chase v. United States, 256 U.S. 1 (1921), where the additional defense was a statute which was in existence at the time of the original trial, but was not pleaded at that time.

[15] Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188 (1939); Emich Motors Corp. v. General Motors Corp., 15 F.R.D. 354 (N.D. Ill. 1953); Feldman v. Connecticut Mutual Life Ins. Co., 57 F. Supp. 70 (E.D. Mo. 1944) (change from defense of poison, excluded from coverage, to death from natural causes, thereby not liable on accidental death coverage of policy); State ex rel. Davis v. American State Bank, 115 Neb. 81, 211 N.W. 201 (1926); Brewster v. Meng, 76 Neb. 560, 107 N.W. 751 (1906); Gadsden v. Thrush, 72 Neb. 1, 99 N.W. 835 (1904).

no bar to new or additional evidence, facts, or defenses being brought in during the retrial,[16] with, of course, proper amendments of the pleadings where necessary.

Another general rule is that the amendment must be offered in the trial court, and may not originate in the appellate court.[17] Although this is not often mentioned specifically, it is the usual procedure followed.[18]

Another widely followed rule is that if defects in the pleadings and proof have been called to the attention of the party, and opportunity to amend was once given but refused, a second opportunity to amend to correct these flaws will not be given.[19] These flaws are generally an omitted allegation which causes the pleadings to be insufficient for defense or relief. This seems to follow a natural justice theory; that since the party had specific notice of the defects and refused the leave to amend at that time, he should not be given a second opportunity to correct these flaws after they have caused him a predictable harm.

IV. AMENDMENTS AFTER REMAND—SPECIFIC EXAMPLES

The greater number of problems arise under a general remand, i.e., one which only directs that further proceedings be held, but gives no specific directions concerning these proceedings as a

[16] On introduction of new conflicting evidence generally, see Armer v. Omaha & Council Bluffs St. Ry. Co., 153 Neb. 352, 44 N.W.2d 640 (1950) (change in testimony permitted, not error to permit); Gohlinghorst v. Ruess, 146 Neb. 470, 20 N.W.2d 381 (1945) (witness in one case, plaintiff in present case, giving contradictory testimony is not permitted if the court does not believe that the change was in good faith); Peterson v. Omaha & Council Bluffs St. Ry., 134 Neb. 322, 278 N.W. 561 (1938) (conflicting testimony without adequate explanation should be disregarded, designed to meet objections at former hearing and present more favorable case for plaintiff); Ellis v. Omaha Cold Storage Co., 122 Neb. 567, 575, 240 N.W. 760, 763 (1932) (inconsistent testimony, not permitted, the court stating that the plaintiff had been "experimenting or toying" with the courts in prior cases). See explanation in Angstadt v. Coleman, 156 Neb. 850, 861, 58 N.W.2d 507, 513 (1953) on basis of estoppel by prior testimony, distinguishing above cases on that ground and permitting differing testimony, between trial testimony and deposition taken before trial.

[17] Champ v. Atkins, 128 F.2d 601 (D.C. Cir. 1942) (appellate court cannot allow trial of issues not before the trial court, but these issues may be brought before the trial court by amendment after remand).

[18] See Clark, Code Pleading 727-29 (2d ed. 1947).

[19] Warner v. Godfrey, 186 U.S. 365 (1902); Tokar v. Redman, 138 Cal. App.2d 350, 291 P.2d 987 (1956); Tracey v. Franklin, 31 Del. Ch. 510, 70 A.2d 250 (Sup. Ct. 1949); Mayer v. Beondo, 83 Cal. App.2d 665, 190 P.2d 23 (1948).

guide to the trial court. The broad principle mentioned above concerning the issues determined by the appellate court is often applied under a general remand. The rule is stated as the "law of the case" rule; that issues determined finally by the appellate court are the law of the case, and may not be relitigated in the trial court.[20] This statement continually appears in cases involving the question of proper conduct of the trial court after remand. *Glissman v. Bauermeister*[21] presents rather emphatic support of this rule and follows the ruling so thoroughly as to invalidate several prior opinions of both the appellate court and the trial court after discovering that the appellate court had previously ruled on the issues involved. The trial court had erroneously allowed relitigation of previously determined issues, and on appeal the appellate court had rendered further opinions on the erroneous proceedings of the trial court, as if they had been correct proceedings. When this error was discovered, all proceedings on those issues following the original ruling by the appellate court were declared invalid. Also, a judgment of dismissal which has been affirmed on appeal must be vacated or otherwise set aside before a party is permitted to amend his pleadings in the case,[22] following the same principle as the "law of the case" rule.

Occasionally, during trial, the remedy originally sought emerges as one to which the plaintiff is not entitled, even though he is entitled to some remedy. In situations of this type, the courts hold that the kind of a remedy should be subject to amendment in the trial court.[23] Related to this is the problem of omitted allegations in the pleadings which are necessary for the court to

[20] Rogers v. Hill, 289 U.S. 582 (1933); Stewart v. Salamon, 97 U.S. 361 (1878); City of Orlando v. Murphy, 94 F.2d 426 (5th Cir. 1938); Walsh Construction Co. v. United States Guarantee Co., 76 F.2d 240 (8th Cir. 1935); In re Zuid-Hollandsche Scheepvaart, 64 F.2d 915 (5th Cir. 1933);Johann v. Milwaukee Electric Tool Corp., 270 Wisc. 573, 72 N.W.2d 401 (1955); Dawson v. Laufersweiler, 242 Iowa 757, 48 N.W.2d 228 (1951); Sawicki v. Clemons, 411 Ill. 28, 103 N.E.2d 107 (1951); Miller v. Ruzicka, 111 Neb. 815, 198 N.W. 148 (1924); Gadsden v. Thrush, 72 Neb. 1, 99 N.W. 835 (1904); Olson v. Lamb, 61 Neb. 484, 85 N.W. 397 (1901).

[21] 149 Neb. 131, 30 N.W.2d 649 (1948).

[22] Knox v. First Security Bank of Utah, 206 F.2d 823 (10th Cir. 1953); Von Wedel v. McGrath, 100 F. Supp. 434 (D.N.J. 1951); see also Markert v. Swift & Co., 173 F.2d 517 (2d Cir. 1949)(appeal and remand are equivalent to vacating judgment, therefore the trial court should permit the amendment).

[23] United States v. Shelby Iron Co., 273 U.S. 571 (1927); Roberge v. Cambridge Cooperative Creamery Co., 243 Minn. 230, 67 N.W.2d 400 (1954); Piechota v. Rapp, 148 Neb. 442, 27 N.W.2d 682 (1947); Missouri, Kansas & Texas Trust Co. v. Clark, 60 Neb. 406, 83 N.W. 202 (1900); Moseley v. Chi-

grant the relief sought. It has been held that the plaintiff should be entitled to the opportunity to amend to correct these omissions, and he should be granted the relief if the amendment cures the defective pleadings.[24]

The defendant may withdraw an answer and insert a demurrer after trial, appeal, and remand.[25] This demurrer can only be for failure of the petition to state a cause of action, because other grounds for demurrer will be waived by this delay. The courts have indicated that although there are other grounds for submitting a demurrer at the time of the original pleading, the right to demur on these grounds is waived by submitting an answer during the pleading stage of the litigation.[26]

The courts have stated that the right to object to any proposed change is not waived even by a delay in making the objection until appeal for the second time, as in *State v. Board of County Commissioners*.[27] The issues were completely changed by the amendment, and were subsequently discarded by the appellate court, using estoppel as the basis for sustaining the objection.

Another problem, which has not yet arisen in Nebraska, is that of permitting one party to amend without also allowing his adversary to amend in order to meet the revised pleading. This problem has resulted in a holding that both must be permitted to amend, one amending under the general amendment provisions, and the other to meet the amended pleading.[28] This is a fair result, and in the interests of impartial justice.

cago, B. & Q. R.R., 57 Neb. 636, 78 N.W. 293 (1899). For the defendant, other defenses may be brought in on remand, if not specifically prevented by the mandate of the appellate court, see note 15 supra, if there is not estoppel in fact.

[24] Everhart v. Huntsville College, 120 U.S. 223 (1887); Puget Sound Navigation Co. v. Lavendar, 156 Fed. 361 (9th Cir. 1907); The Ada M., 20 F. Supp. 331 (S.D.N.Y. 1937); County of Mohave v. Chamberlin, 78 Ariz. 422, 281 P.2d 128 (1955). Cf., Cress v. Leuenberger, 267 Wisc. 232, 66 N.W.2d 168 (1954); Halpin v. Scotti, 415 Ill. 104, 112 N.E.2d 91 (1953). But see, Sawicki v. Clemons, 411 Ill. 28, 103 N.E.2d 107 (1951). This problem has not been decided in Nebraska.

[25] Markel v. Glassmeyer, 137 Neb. 243, 288 N.W. 821 (1939); Edney v. Baum, 70 Neb. 159, 97 N.W. 252 (1903).

[26] Edney v. Baum, 70 Neb. 159, 97 N.W. 252 (1903). For demurrers, see §§ 25-806-810 Neb. Rev. Stat. (Reissue 1956).

[27] 60 Neb. 566, 83 N.W. 733 (1900). On pleading waiver or estoppel, see generally Annot., 120 A.L.R. 8 (1939).

[28] Kern v. Kelner, 75 N.D. 703, 32 N.W.2d 169 (1948).

At times, the proposed amendment would have no effect on the result of the case. In such a situation, it has been held that the amendment should not be allowed.[29] This seems quite justifiable, in order to prevent prolonging litigation unnecessarily, and to prevent clogging the courtrooms.

In the federal courts several decisions indicate that the plaintiff may amend his petition to correct flaws in the allegations pertaining to jurisdiction of the court.[30]

An extension of the "law of the case" rule stated above is that if the remand mandate contains specific directions to the lower court regarding the procedure, these directions must be followed.[31] Thus if the appellate court remands a case for further proceedings, it is not within the discretion of the lower court to dismiss without further proceedings.[32]

A rather unusual situation in which amendment was permitted was one in which the amendment caused a reformation of an instrument.[33] After trial, appeal, and remand, the reformation was sought, and allowed. The court stated that this reformation did not actually change the position of the party, because it merely made it possible to establish the contentions which he had been attempting to prove throughout the trial proceedings. The prior opinion of the appellate court was not violated, as it was rendered

[29] Lynch v. Watson, 78 Cal. App.2d 96, 177 P.2d 657 (1947); Globe Indemnity Co. v. Liberty Mutual Ins. Co. 138 F.2d 180 (3d Cir. 1943).

[30] Benbow v. Wolf, 217 F.2d 203 (9th Cir. 1954); Finn v. American Fire and Casualty Co., 207 F.2d 113 (5th Cir. 1953); International Ladies' Garment Workers' Union v. Donnelly Garment Co., 121 F.2d 561 (8th Cir. 1941). Amendments not permitted to correct flaw pertaining to jurisdiction, Young v. Garrett, 5 F.R.D. 117 (W.D. Ark. 1946), *aff'd*, 159 F.2d 634 (8th Cir. 1947).

[31] Moody v. Johnston, 70 F.2d 835 (9th Cir. 1934); Sowerwine v. Central Irrigation District, 91 Neb. 457, 136 N.W. 44 (1912); Brewster v. Meng, 76 Neb. 560, 107 N.W. 751 (1906)(directions to enter a specific decree, error to allow further proceedings). See also Chase v. United States, 256 U.S. 1 (1921); Sidis v. F-R Publishing Corp., 7 Fed. Rules Serv. 15a.24, Case 2 (S.D.N.Y. 1943); Powers & Co. v. American Society of Tool Engineers, 345 Mich. 392, 75 N.W.2d 824 (1956).

[32] Sowerwine v. Central Irrigation District, 91 Neb. 457, 136 N.W. 44 (1912).

[33] Pinkham v. Pinkham, 60 Neb. 600, 83 N.W. 837 (1900), *aff'd on rehearing*, 61 Neb. 336, 85 N.W. 285 (1901). See for comparison, O'Neil v. Union National Life Ins. Co., 162 Neb. 284, 75 N.W.2d 739(1956); Chicago, R.I. & P. Ry. Co. v. O'Donnell, 72 Neb. 900, 101 NW 1009 (1904), modification of defensive statements permitted.

upon a different theory of the reformed instrument, thus avoiding the "law of the case" rule barring amendment.

Another uncommon situation arises when the pleadings or the record on appeal are vague. Early federal decisions on this point remanded the cases with directions to permit amendment to clarify the record, thus enabling the court to make a final disposition of the case.[34] These early decisions have been followed in the federal courts and other jurisdictions.[35] Following this same policy, defendants have been permitted to amend their pleadings to correct vagueness.[36] These situations do not often arise, and neither have been adjudicated by the Nebraska courts.

There is a difference of opinion among courts as to the effect of a reversal and remand upon the proceedings to be taken by the lower court. One early Nebraska case states that upon a remand for further proceedings, the parties are placed in the same position as though they had never litigated their rights, and allowed the trial court to try de novo the issues involved.[37] The court went on to state specifically that the prior position and holdings were not res judicata, because the second trial proceeded upon different issues. The original issues were determined by the appellate court, which then remanded for retrial under a corrected view of the law. In another case, the court stated that, on remand, the trial was to be de novo only from the point of the reversible error in the proceedings, and not a complete trial de novo.[38]

V. CONCLUSION

Thus it seems that on the first trial, although they state that statutes permitting amendments should be liberally construed, the courts do not construe these statutes so liberally as to allow a change in position from that taken prior to trial which would be detrimental to the adverse party. However, after the first trial has been held, appeal taken and remand given, amendments may be

[34] Combs v. Hodge, 62 U.S. (21 How.) 397 (1858); Estho v. Lear, 32 U.S. (7 Pet.) 130 (1833); The Diving Pastora, 17 U.S. (4 Wheat.) 52 (1819); Leeds v. Marine Ins. Co., 15 U. S. (2 Wheat.) 380 (1817).

[35] Martin v. Chernabaeff, 124 Cal. App.2d 648, 269 P.2d 25 (1954); Didier v. MacFadden Publications, 299 N.Y. 49, 85 N.E.2d 612 (1949).

[36] W. C. Shepherd Co. v. Royal Indemnity Co., 192 F.2d 710 (5th Cir. 1951) (defendant permitted to amend in order to make more specific allegations in his answer).

[37] Badger Lumber Co. v. Holmes, 55 Neb. 473, 76 N.W. 174 (1898).

[38] Missouri, Kansas & Texas Trust Co. v. Clark, 60 Neb. 406, 83 N.W. 202 (1900).

allowed to change the issues, plead new facts, reform instruments, change defenses, and correct certain types of defects in the pleadings, as long as they are not inconsistent with the opinion of the appellate court. The retrial must proceed in accordance with the mandate of the appellate court, and if specific directions are given by the appellate court, the trial court must obey. Perhaps the best course of action is to follow the statement made in *Brewster v. Meng*,[39] and plead all possible defenses, facts, and causes of action in the first instance. This would avoid the possibility of not being allowed to plead them later in the course of litigation. If something new arises which is not known or available at the time of the first action, it probably may be brought in later by amendment, this being one of the points on which the courts are in agreement. For the defendant, even though an answer has been filed, and trial held accordingly, it seems that if the party determines later that the petition does not actually state a cause of action, the answer may be withdrawn and a demurrer inserted for that reason, although the petition probably cannot be attacked after completion of the original trial for other reasons which would have been available as a basis of attack at that time.

Several of the anomalous decisions in this area may be explained by statements of the court indicating that the party was not acting in good faith.[40] The courts seem to act under a sense of equity, or justice,[41] dependent upon the good faith of the parties in conducting the litigation. Therefore it is best at all times to present to the court good reasons for the proposed amendment.

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[39] 76 Neb. 560, 561-62, 107 N.W. 751, 752 (1906). "A case cannot be tried piecemeal. There must be an end to litigation. A party cannot be allowed to present a part only of his defense and when, after appeal, the case has been remanded for judgment, be allowed to make new issues, presenting other facts which he claims as a defense to the action, and which facts existed and were well known to him prior to the first trial."

[40] Gadsden v. Thrush, 72 Neb. 1, 99 N.W. 835 (1904); see also notes 14, 15, and 19, supra.

[41] See Yates v. New England Mutual Life Ins. Co., 117 Neb. 265, 271, 220 N.W. 285, 287-88 (1928).